

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by )

**MARINA LAGARDE** )

From rejection during probationary )  
period as a Health Project Manager I )  
with the Department of Health Services )  
at Ontario )

SPB Case No. 05-0929

**BOARD DECISION**

(Precedential)

No. 07-02

July 10, 2007

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**APPEARANCES:** Thomas R. Bradford, Oliver Tomas and Avi Burkwitz, Peterson & Bradford, LLP, on behalf of appellant, Marina LaGarde;<sup>1</sup> Jean-Pierre Francillette, Staff Counsel, on behalf of respondent, Department of Health Services.

**BEFORE:** Sean Harrigan, President; Anne Sheehan, Vice President; Maeley Tom, Patricia Clarey and Richard Costigan, Members.

**DECISION**

This case is before the State Personnel Board (SPB or Board) after the Board granted the Department of Health Services' Petition for Rehearing and determined to hear the case itself. In this Decision, the Board concludes that the Department failed to effectuate service of process of the notice of rejection during probationary period in the manner prescribed by statute and that, therefore, the Department failed to effectively reject appellant prior to the expiration of her probationary period. Therefore, the Board revokes the rejection during probation.

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<sup>1</sup> Thomas R. Bradford and Oliver Tomas, Peterson & Bradford, LLP, filed a supplemental brief on behalf of appellant prior to oral argument. Avi Burkwitz appeared on behalf of appellant at oral argument.

## **ISSUE**

Did the Department comply with the statutory requirements for servicing appellant with the Notice of Rejection During Probation?

## **FINDINGS OF FACT<sup>2</sup>**

The Department of Health Services (DHS or Department) hired appellant as a Staff Services Manager I on April 12, 2004. DHS subsequently changed appellant's classification to Health Project Manager I. Appellant was subject to a one-year probationary period that was to expire on April 11, 2005. In April 2005, the Department sent appellant a Notice of Rejection During Probationary Period (Notice of Rejection), effective April 18, 2005. The Notice of Rejection stated that appellant's probationary period was being extended from its original expiration date of April 11, 2005 to provide appellant with full notice required by SPB Rule 321(c).<sup>3</sup>

The Department sent the Notice of Rejection by means of a private delivery service, United Parcel Service (UPS). The Notice of Rejection was dated April 8, 2005. The record does not reflect that any affidavit or other documentation was attached to the Notice of Rejection to indicate the date it was sent by DHS, nor does the record establish that appellant received the UPS package. The record does, however, contain an unauthenticated printout from the UPS website that appears to indicate that a

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<sup>2</sup> These Findings of Fact are based upon the written submissions of the parties to the ALJ and to the Board. No testimony was taken.

<sup>3</sup> 2 Cal. Code Reg., § 321. Rule 321, subdivision (c), allows an appointing power to extend an employee's probationary period for a maximum of five working days in order to comply with notice requirements as set forth in Section 52.3 for rejection during probation.

package from DHS was delivered to appellant's front door on April 12, 2005. Appellant appears to concede that she received the Notice of Rejection on April 12, 2005.

### **PROCEDURAL SUMMARY**

At the hearing before the ALJ, appellant filed a motion to dismiss the Notice of Rejection on the ground that it was not timely served in accordance with Government Code section 19173 and SPB Rule 52.3,<sup>4</sup> because it did not provide appellant with at least five working days to respond to the notice. The ALJ issued a Proposed Decision setting aside appellant's rejection during probation on the ground that the Department had failed to serve appellant with the Notice of Rejection in the manner prescribed by Government Code section 18575. At its meeting on December 5, 2006, the Board adopted the ALJ's Proposed Decision. At its meeting on February 20, 2007, the Board granted the Department's Petition for Rehearing. Following the submission of written<sup>5</sup> and oral<sup>6</sup> arguments by the parties, the Board now issues this Decision.

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<sup>4</sup> 2 Cal. Code Reg., § 52.3.

<sup>5</sup> The Board's files reflect that, by letter dated March 9, 2007, Board staff advised the parties that any written arguments on rehearing must be received by the Board on or before April 13, 2007. Neither party submitted written argument by the deadline specified by Board staff. The Department's representative orally advised Board staff that the Department intended to rely on the arguments set forth in its Petition for Rehearing. On or about May 3, 2007, appellant submitted a "Supplemental Brief Re: Insufficiency of Service of Rejection from the Department of Health Services; Declarations of Thomas R. Bradford and Marina LaGarde; Exhibits." Ordinarily, the Board would rely only on written arguments timely submitted to it in accordance with the deadlines established for submitting briefs on rehearing before the Board. Under the circumstances of this case, however, and given that the parties may have been confused about the necessity of filing additional briefs upon rehearing, the Board will accept for consideration both the Department's brief filed in support of its Petition for Rehearing as the Department's argument on rehearing before the Board and appellant's late-filed supplemental brief.

<sup>6</sup> At oral argument before the Board on May 8, 2007, counsel for the Department tendered a package of documents that had not been previously filed with the Board nor served on appellant. After discussion between the parties and the Board, the Board denied the Department's request to accept this late submission, and it will not be considered.

## **PRINCIPLES OF LAW**

Government Code section 19173, subdivision (a), authorizes an appointing power to reject a probationary employee during the probationary period on specified grounds. Government Code section 19173, subdivision (b)(1), sets forth the following procedural requirements that must be followed when rejecting an employee during probation:

A rejection during probationary period is effected by the service upon the probationer of a written notice of rejection which shall include: (A) an effective date for the rejection that shall not be later than the last day of the probationary period; and (B) a statement of the reasons for the rejection. Service of the notice shall be made prior to the effective date of the rejection, as defined by board rule for service of notices of adverse actions. Notice of rejection shall be served prior to the conclusion of the prescribed probationary period. The probationary period may be extended when necessary to provide the full notice period required by board rule. Within 15 days after the effective date of the rejection, a copy thereof shall be filed with the board.

SPB Rule 52.3 further specifies the requirements for rejections during probation, and provides:

(a) At least five working days before the effective date of a proposed adverse action, rejection during the probationary period, or non-punitive termination, demotion, or transfer under Government Code section 19585, the appointing power, as defined in Government Code Section 18524, or an authorized representative of the appointing power shall give the employee written notice of the proposed action. At least 15 calendar days before the effective date of a medical termination, demotion, or transfer under Government Code section 19253.5 or an application for disability retirement filed pursuant to Government Code section 19253.5(i)(1), the appointing power or an authorized representative of the appointing power shall give the employee written notice of the proposed action. The notice shall include:

- (1) the reasons for such action,
- (2) a copy of the charges for adverse action,
- (3) a copy of all materials upon which the action is based,

(4) notice of the employee's right to be represented in proceedings under this section, and

(5) notice of the employee's right to respond to the person specified in subsection (b).

(b) The person whom the employee is to respond to in subsection (a)(5) shall be above the organizational level of the employee's supervisor who initiated the action unless that person is the employee's appointing power in which case the appointing power may respond to the employee or designate another person to respond.

(c) The procedure specified in this section shall apply only to the final notice of proposed action.

Government Code section 18575 specifies the manner of service of a notice of rejection during probation and provides:

Whenever any notice, paper, or other document, except a subpoena, is directed to be given to or served upon any person or state agency, such notice, paper, or document may be personally served or it may be served by mail to the last known residence or business address of the addressee. Unless otherwise specifically provided in this part the giving of notice of matters to be heard or considered by the board or the Department of Personnel Administration shall be governed by board or department rule.

Service by mail of the charges in a disciplinary proceeding, the notice of an employee's suspension, and the notice of a probationer's rejection is made by the enclosure of such charges or notice in a sealed envelope, addressed to the last known address of the person to be served, registered with return receipt requested, and the depositing of it in the United States mail with postage fully prepaid. Service is complete on mailing. Service by mail of any other notice, paper, or document is made in the manner provided by Sections 1012 and 1013 of the Code of Civil Procedure. Proof of service, either personal or by mail, shall be made by affidavit. (Emphasis added.)

The courts have repeatedly confirmed that a civil service probationer is entitled to have the statutory procedure for dismissal strictly followed.<sup>7</sup> In the absence of

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<sup>7</sup> *Nilsson v. State Personnel Board* (1938).25 Cal.App.2d 699, 705; *Brown v. State Personnel Board* (1941) 43 Cal.App.2d 70, 75; *Wiles v. State Personnel Board* (1942) 19 C.2d 344, 351.

compliance with the statutory procedures, the rejection fails to go into effect, and the employee obtains permanent civil service status.<sup>8</sup>

## **ANALYSIS**

Government Code section 18575 specifies two methods of service of a notice of rejection during probation: personal service or service by mail. The statute further specifies the manner in which service by mail may be effected: the notice must be enclosed in a sealed envelope, addressed to the last known address of the person to be served, and sent by registered mail, with return receipt requested, and must also be deposited in the United States mail with postage fully prepaid. Service of a notice of rejection during probation by a commercial delivery service such as UPS is not one of the statutorily authorized methods of service set forth in Government Code section 18575.

While the Legislature could have specified use of a commercial delivery service as an authorized method for service of a notice of a rejection during probation from the state civil service, it did not do so. For example, under the Administrative Adjudication Bill of Rights Act, use of a commercial delivery service for service of a notice by mail is permissible, but only in the absence of a statutory provision specifying the form of mail to be used.<sup>9</sup> Therefore, because a statutory provision exists specifying the form of mail

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<sup>8</sup> *Wiles v. State Personnel Board*, *supra*, at p. 352; *Santillano v. State Personnel Board* (1981) 117 Cal.App.3d 620, 625.

<sup>9</sup> Gov. Code, § 11440.20(b) provides: "Unless a provision specifies the form of mail, service or notice by mail may be by first class mail, registered mail, or certified mail, by mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender."

to be used in effecting service of a notice of rejection during probation, the Department cannot utilize another, unauthorized method of service.

While probationary employees are generally entitled to lesser procedural protections upon termination than those afforded to employees who have attained permanent status,<sup>10</sup> they are entitled to notice of the proposed action and the opportunity to respond prior to the effective date of the rejection.<sup>11</sup> Both of the statutorily authorized methods for service of a notice of rejection—personal service and service by registered mail, return receipt requested—serve to ensure that the employee will receive actual notice of the charges and the opportunity to respond prior to the effective date. In contrast, the use of a commercial delivery service does not necessarily provide such assurances, particularly where, as here, there is no evidence to establish actual receipt of the notice by appellant, such as a signature accepting delivery of the notice from UPS. Instead, the evidence indicates that a box was simply left on appellant's doorstep. Thus, the manner of service failed to ensure timely receipt by appellant.

The Board rejects the Department's contention that, by appearing at scheduled hearings before the ALJ for the purpose of requesting continuances and filing a motion to dismiss, appellant waived any objection to the defect in service of the notice.<sup>12</sup> As indicated above, probationary employees are entitled to have the statutory procedures

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<sup>10</sup> See *Anderson v. State Personnel Board* (1980) 103 Cal.App.3d 242, 249 ("Probationary employees have only statutory rights, and have no vested interest in employment.").

<sup>11</sup> Gov. Code, § 19173; 2 Cal. Code Reg. § 52.3.

<sup>12</sup> The record indicates that appellant requested continuances on several occasions in order to obtain new counsel or because her counsel was not available. In addition, one of appellant's retained attorneys filed a motion to dismiss

for termination strictly followed, and failure to follow those procedures results in the employee obtaining permanent civil service status. The Department has provided no authority to support its argument that the appearance by a probationary employee before the Board for the purpose of requesting continuances and to file a motion to dismiss on the ground that the notice of rejection was not timely served legitimizes a rejection during probation from the state civil service that was imposed without strict compliance with the statutory requirements.<sup>13</sup> Having failed to properly serve appellant with a notice of rejection during probation within the statutory time period and in accordance with the statutorily prescribed methods of service, the Department failed to effectuate a valid rejection during probation.<sup>14</sup> Accordingly, appellant obtained permanent status upon termination of the probationary period and is subject to dismissal only for cause pursuant to Government Code section 19570, *et seq.*

Finally, the Board rejects the Department's assertion that dismissal of the action is improper because it did not have the opportunity to present evidence and argument before the ALJ on the issue of service of process. The Department had a full opportunity to respond to appellant's motion to dismiss the action on the ground that

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the action on the ground that it failed to comply with the requirement that she be given five working days to respond, pursuant to Government Code section 19173 and 2 Cal. Code Reg. § 52.3.

<sup>13</sup> All of the cases cited by the Department involve defendants in a civil proceeding who waived defects in service of a summons by voluntarily appearing in court. See, e.g., *United States v. Vacant Land, etc.* (9<sup>th</sup> Cir. 1993) 15 F.3d 128, 131 (interested party in real property forfeiture action waived defect in service by a appearing on the merits); *Blackburn v. Bucksport & E.R.R. Co., et al.* (1908) 7 Cal.App. 649 (Defendant in quiet title action voluntarily appeared); *Ruszovan v. Ruszovan* (1969) 268 Cal.App.2d 902, 907 (voluntary appearance in domestic relations case is equivalent to personal service of summons). Appellant is not a defendant in a civil proceeding, but is a civil service employee entitled to due process protections prior to termination of employment.

<sup>14</sup> The Department's further contention that appellant suffered no prejudice as a result of the due process violation is likewise rejected. Rejections during probation must comply strictly with the statutory requirements. (*Wiles v. State Personnel Board, supra*; *Brown v. State Personnel Board, supra*.)



appellant was not served in accordance with Government Code section 19173 and SPB Rule 52.3, which requires the employee to be given five working days to respond to the notice of rejection.<sup>15</sup> While appellant did not specifically rely on Government Code section 18575 in her motion, the Department's failure to comply with the statutory requirements for service of a notice of rejection also results in a failure to provide the requisite 5 working day notice period. A rejection during probation taken without compliance with all of the statutory requirements is invalid. Moreover, the Department had ample opportunity to present argument to the Board on the issue of service of process upon rehearing of this case. Therefore, we find that the Department was not prejudiced by the specific reliance by the ALJ and the Board on the service of process requirements of section 19575 rather than the 5-day notice requirement set forth in section 19173 and SPB Rule 52.3.<sup>16</sup>

## **CONCLUSION**

Termination of a probationary employee requires strict compliance with the statutory requirements. Because the Department failed to comply with those requirements, its attempted rejection of appellant during probation was ineffective, and she attained permanent status upon the expiration of the probationary period.

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<sup>15</sup> 2 Cal. Code Reg. § 52.3.

<sup>16</sup> At oral argument, the Department withdrew its argument that the ALJ had recused himself from this case prior to issuing his Proposed Decision.

## **ORDER**

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The rejection during probation of Marina LaGarde from the position of Health Project Manager I with the Department of Health Services at Ontario is revoked.
2. The Department of Health Services shall reinstate appellant to her position as Health Project Manager I with the Department of Health Services at Ontario;
3. The Department of Health Services shall pay to Marina LaGarde all back pay, if any, that would have accrued to her had she not been rejected during probation, in accordance with Government Code section 19180;
4. This matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary due appellant.
5. This decision is certified for publication as a Precedential Decision.  
(Government Code § 19582.5).

## **STATE PERSONNEL BOARD**

Sean Harrigan, President  
Anne Sheehan, Vice President  
Maeley Tom, Member  
Patricia Clarey, Member  
Richard Costigan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 10, 2007, as corrected at its meeting on September 4, 2007.

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Suzanne M. Ambrose  
Executive Officer  
State Personnel Board

[LaGarde-dec-rev]